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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent

DUNCAN COFFEE COMPANY'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Duncan Coffee Company for this court's writ of certiorari to review a judgment and opinion of the United States Emergency Court of Appeals rendered in this cause on the 16th day of December, 1949.

Jurisdiction

The jurisdiction of this court to review the questions herein presented is invoked under paragraph (d) of Section

924 of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 901 et seq.) providing that petition for certiorari may be filed in this court within thirty days after entry of judgment by the Emergency Court of Appeals. The judgment of the United States Emergency Court of Appeals became final on the 16th day of December, 1949.

The 30 days time for filing this petition and brief in support thereof as provided by the aforesaid Act (Section 924 (d)) expires Sunday, January 15, 1950.

Summary and Statement

The court below held that the order of the respondent interpreting its coffee import subsidy contract with petitioner under the provisions of the said Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 901 et. seq.) so as to withhold $79,059.36 from subsidies earned by the petitioner by its actual importations of coffee and its reasonable and lawful expenditure of an equal sum therein, under said contract, was valid and in accordance with the purposes and intent of the said Act and that said contract constituted the mutual agreement and intent of the parties therefor, and was not discriminatory, notwithstanding the uncontradicted evidence and the admissions of the respondent clearly showing that the particular coffees by reason of which such earned subsidy was withheld were coffees which had not been imported by petitioner as the Importer engaged in the importation thereof, the petitioner received no subsidy thereon as the Importer thereof, and such coffees had been lawfully acquired by petitioner from domestic sources of supply in the continued exercise of petitioner's traditional established coffee Roaster industry practices and status as a coffee Roaster equally, alike, competitive and identical in all things with all of the 1,000 other coffee Roasters as such. The apparent basis for the court's holding was that the language of the contract constituted

petitioner's mutual consent to such withholding and that while such withholding might not have been upheld if such language had been that of a regulation under the identical Act, nevertheless, being the language of a contract it was bound to construe the same without regard to what the intent of said language under said Act would have been when used in a regulation. The court further indicated that a heavier burden fell upon the petitioner traditionally engaged in identical practices as the 1,000 other coffee Roasters because such practices were integrated with the separate and different practices of the green coffee Importer, and that there was apparently no relief under the said Act available to petitioner from such discrimination against its competitive Roaster functions and consequence.

Questions Presented

1. Is it the intent and purpose of the Emergency Price Control Act to interpret the terms "the Importer" and "the Importer's inventory" harmoniously with the coffee Roaster industry established practices and traditional industry understanding as reflected by the uncontradicted evidence and by respondent's admissions, when such terms are used in a governmental agency regulation under the Emergency Price Control Act, and to interpret the identical terms so as to conflict with the coffee Roaster industry established traditional practices and industry understanding and such evidence and admissions, resulting in a burden to the coffee Roaster as such not previously characteristic of the industry, when such terms are used in a governmental agency contract under the identical Act, and thereby subjecting some of the 1,000 competitive coffee Roasters as such of the United States and their economically and mechanically identical non-imported, non-subsidy inventories to such burden contrary to established distribution practices?

2. Was there "a mutual meeting of the minds" that the terms "the Importer" and "the Importer's inventory" as used in this contract were intended to fix a burden upon petitioner's continued exercise of the traditional coffee industry practices as a Roaster equally, alike and competitive with all other Roasters as such, solely because of petitioner's performance of the equally traditional but separate and different Importer's functions as such, under this contract?

3. The restoration and stabilizing of normal economy and distribution being an essential purpose of the said Emergency Price Control Act, is it contrary to the purposes and intent of said Act and particularly Section 902 (h), to interpret this contract under said Act for subsidies upon importations accomplished thereunder, without a prior affirmative finding of necessity, and to totally disregard the uncontradicted evidence establishing the traditional practices and industry understanding to be contrary to such interpretation, so as to compel changes in the established industry practices of petitioner as a coffee Roaster and to fix a novel burden upon some of such coffee Roasters including the petitioner, when it is admitted that such established practices of all Roasters alike constitute the vital normal distribution of green coffee and without which practice normal distribution could not exist, and when it is admitted that all coffee Roasters are mechanically, economically, equal, alike and competitive and dependent upon their sales of Roasted coffees as such, regardless of whether any such Roaster did or did not exercise to a greater or lesser extent also the additional and different Importer functions equally and alike with all Importers as such?

4. The restoration and stabilizing of normal distribution and economy being an essential purpose of the law out of which this contract and importing program arise, and Section 902 (h) of the Emergency Price Control Act for-

bidding changes in the established coffee industry practices and distribution (without affirmative finding of necessity), and it being admitted that the practice of petitioner as a Roaster by which it acquired its Roaster inventory against which this withholding is assessed was not consequent of any Importer function but was instead the traditional practice of all Roasters as such, and it being admitted that without such practices of all Roasters as such the normal distribution of green coffee could not exist, and there being no finding of affirmative necessity for such burden, is it valid to interpret this contract under the Act so as to impede and burden the restoration and stabilizing of such normal distribution respecting coffee Roasters whose functions are dual and by an integrated management including petitioner, when such inventory is accumulated solely by the exercise of such traditional coffee Roaster industry practices of all Roasters without regard to integration, obtaining such identical inventories from domestic sources and not by the exercise of any Importer function or practice, and to do so when regulations as such under the identical Act, are judicially interpreted and determined contrarily?

5. Is it lawful under the Emergency Price Control Act to interpret a contract for subsidies upon importations of green coffee so that the effect upon all Importers as such is equal and alike but the effect upon the inventory and established practices and distribution of all Roasters as such including petitioner is unequal and discriminatory against petitioner as a coffee Roaster solely because petitioner exercised and did not change the traditional established coffee Roaster practices as such during the period while it was also exercising the traditional functions of a coffee Importer under this coffee Importer contract?

6. Was it intended under the Emergency Price Control Act out of which this contract arises, that the terms "the

Importer'' and ''the Importer's inventory'' should be interpreted contrary to the traditional understanding and established practice of the industry and contrary to the interpretation of regulations arising under the identical Act, and contrary to the distinction between the coffee Roaster as such and the Importer as such as is reflected by War Food Order 146 (11 F.R. 3785), so as to fix a burden not characteristic of the industry upon such inventories of some coffee Roasters as such merely because such traditional practices are integrated under a singular management with the established practices of a coffee Importer, when the uncontradicted evidence and the admitted facts show that identical industry practices and substantial inventories of more than 688 other coffee Roasters economically, mechanically and competitively identical in all things with petitioner whose Roaster practices were not integrated with Importer practices, remained free at all times to engage in such identical established industry practices wholly free of such burden?

The Reasons Relied On for the Allowance of the Writ

1. Petitioner does not believe it to be the purposes or intent of this Act that its effects should be in keeping with the established coffee industry traditional practices and understanding of the significance of the terms ''the Importer'' and ''the Importer's inventory'' where a regulation is involved and something entirely different and contrary where a contract arising under the identical Act is involved. The Act itself makes no such distinction, and does not provide for any waiver or abandonment of any of its provisions merely because its intent and purposes are sought to be accomplished by contract rather than regulation. If the contract is to be valid under the Act it should be interpreted in accord with the identical intent and purposes of the Act as in the regulations thereunder.

2. The subsidy contract is not in the usual commercial everyday contract atmosphere of the coffee industry. It arises from unusual conditions which are transitory as is the law itself from which it derives its existence. These conditions gave rise to certain stated purposes and desires of the government and it was not contemplated that either such conditions or the means of overcoming the undesired effects thereof were to become permanent or to constitute the usual atmosphere of contract between the parties. But this contract related directly to the coffee industry and its established practices which were traditional and it used the terms "the Importer" and "the Importer's inventory" which were traditional to and of established significance in that industry. Can the governmental agency indirectly by mere interpretation change the significance of terms traditional to the coffee industry by the mere medium of contract having a temporary objective, and which terms have a different significance when used in a directly related governmental agency regulation, when both the contract and the regulation depend for their validity upon the purposes and intent of the identical Act and such Act provides no distinction between contract and regulation?

3. Because the respondent prepared this contract and knew or should have known that the terms which it used therein relating to the coffee industry were terms having a fixed significance within that industry and knowing that the purposes of the contract were purposes similar to and traditionally engaged in by the coffee industry, the petitioner feels that such terms should not be given a significance contrary to the actual functions, purposes and economic consequence which are traditionally established and understood in the coffee industry, and especially so, when such contrary significance causes economic discrimination against petitioner and adds a burden to the established tra-

ditional distribution and cost practices of the industry which has never before existed. Petitioner feels that it can rely upon the fact that the underlying purposes and intent of the Act out of which this contract arose are to restore and stabilize NORMAL traditional industry distribution practices, and that Section 902 (h) of the Act forbidding changes in the coffee industry established distribution practices directly supported such underlying purposes and intent.

4. As a coffee Roaster engaged in such practices for more than 30 years petitioner is economically and competitively admitted to be identical with all of the 1,000 coffee Roasters in the United States. Petitioner does not believe it to have been the purpose and intent of the Act to countenance interpretation whether of a contract or a regulation, arising by the authority of the Act, so as to result in substantial discrimination against any class or segment of industry in respect of its normal and established distribution practices or cost practices. Yet, there were only 312 coffee Importing contracts with coffee Importers as such, as compared to more than 1,000 coffee Roasters as such, who admittedly had on hand substantial inventories identical with the petitioners. While the interpretation of the court below has the effect of treating equally and alike all Importers of coffee under this contract regardless of whether any Importer did or did not perform any Roaster function, such interpretation works a drastic economic and competitive handicap upon all Roasters including the petitioner who exercised the separate and different functions of an Importer as such.

5. The coffee industry has traditionally included those such as petitioner, exercising dual functions and capacities of both the coffee Roaster as such and the coffee Importer as such. The industry also includes Roasters who exercise

no Importing functions and capacity, and Importers who exercise no Roaster functions.

6. Petitioner further relies upon the fact that the Act recognizes that the normal economy which it sought to restore and stabilize was traditionally a competitive economy within all established segments of the coffee industry, including the Roasters, the Importers and those enterprises which are competitive in dual capacities. Therefore, it is inconceivable that this Act intended to restore and stabilize normal competitive economy and at the same time intended to place a burden upon the established economic and competitive practices of a coffee Roaster unequally and unlike all other coffee Roasters as such, merely because he has traditionally and continues to engage in the separate and different capacity as a competitive coffee Importer equally and alike with all coffee Importers as such, without regard to whether such result is accomplished by the interpretation of a contract.

7. Petitioner relies also upon the fact that in an unusual and admittedly transitory atmosphere of conditions and circumstances such as that out of which this contract arose, wherein governmental agencies are involved in more or less closely related objectives, the petitioner is entitled to look not only to the established traditions, practices and significance of terms regularly and specifically relating to petitioner's industry, but he is entitled also to look to the attitude and expressions including interpretation of such governmental agencies in similar situations. In the meat subsidy program by regulation the governmental agency provided for what was called an "ownership and control" clause, which put those in the meat industry who exercised dual capacities, upon absolute notice that such integration of functions and activities would deprive them of subsidies. There was no such clearly stated penalty or hazard included

in the coffee Importer subsidy program or contract. War Food Order 146 (11 F.R. 3785) recognized the distinction between and provided for quantity controls in respect of the inventories of Importers as such and of Roasters as such without regard to the existence or non-existence of dual capacities or functions. The court below has expressly held in interpreting a regulation under this identical Act (Booth Fisheries Corporation, 153 F. 2d 449) that a single integrated enterprise being engaged in multiple capacities was not prejudiced thereby in respect of a price regulation; it likewise held in the case of *Electromatic Distributors* vs. *Clark,* 162 F. 2d 212, that a radio manufacturer could not be prejudiced as a manufacturer by a price regulation fixed for manufacturers, on radio sets which he did not manufacture but which he imported instead. There is a striking analogy between the mechanical and economic realities of these two cases to the case at bar. Supporting this reasoning is the further obvious fact that while subsidies in this atmosphere of unusual and transitory conditions had been handled by regulation in respect of many different commodities with which the economy was concerned, the coffee subsidy program was the first and only subsidy program of its kind which was generally handled through the means of contract. Therefore, it is not unreasonable to expect that the coffee industry would be dealt with not unlike the interpretations respecting regulations, since there was no clear contrary precedent or judicial determination available. It was reasonable for the coffee industry to rely upon the interpretations of regulations dealing with the same subject matter arising under the identical authority of law and being a part of the economic stabilization and recovery effort, and those in the coffee industry had a right to feel that their participation in such effort and stabilization program would cause their contracts to be interpreted not unfairly and in the light of their established practices and the industry

significance of the terms descriptive of their various traditional functional segments.

8. For further reason upon which petitioner relies, it is common knowledge that of those engaged in the coffee industry many are deficient in the refinements and intricacies sometimes attending judicial determination of what may or may not be ambiguity. Petitioner feels that for the terms "the Importer" and "the Importer's inventory" to be interpreted contrary to the uncontradicted evidence of the established practices and understanding of the industry in this unusual and emergency atmosphere in the case of a contract, while such interpretation is harmonious with such industry practices and understanding in the case of a regulation arising from the identical atmosphere, legislation and conditions, is nothing if not ambiguous, and especially so when there is available for guidance only the interpretation of the regulations as such and the traditional industry significance of the terms. It is obvious to all reasonable minds that the functions, practices and consequent inventory of the coffee Roasters as such is not and cannot be the same in fact or in economic reality or competitive enterprise as the Importer's functions and consequent inventory. Petitioner and the other coffee Roasters who also import are entitled to know with certainty whether they are to be burdened by reason of factual reality, or by fanciful distinctions found in the judicial reasoning of the court below.

9. Finally, if lawful and traditional integration of two separate and different functional activities and the economic consequence of each are to necessitate burden upon the coffees acquired by the Roaster in a traditional Roaster function in established distribution practices from domestic sources of supply, because such Roaster functions are integrated under a single management with the Importer func-

tions in acquiring coffee from foreign sources of supply, in the interpretation of a contract but not in the case of a regulation, both arising from the same law, then the coffee Roasters ought to be clearly informed, that their competitive and economic judgment and arrangements can be governed accordingly. For in such a state of affairs the economy of the coffee industry is wholly subject to the attitude of the interpreter which becomes the law, and there is no comfort in the law as written or in the established traditional industry practices and reality which the law then so jestingly protects.

10. Where the dominant purpose of the law is to restore and stabilize normal distribution, and the dominant purpose of the contract in the stabilization atmosphere, is to aid and encourage importing of coffee, and the contract is highly vocal as to the Importer practices as such, but is wholly silent as to the coffee Roaster's known, established practices as such, and the practices of each are different, but both are vital to normal traditional established distribution with which the law out of which the contract arises is concerned, the contract ought not to be interpreted so as to burden the Roaster practices unequally and unlike as to all Roasters as such, while it burdens equally and alike all Importers as such, merely because the industry includes some Roasters as such who are integrated under a single management with the Importer practices as such, and because the burden arises from contract under the identical law rather than under a regulation (both being authorized but not distinguished by this law), when the distribution, economic practices and purposes and dependency of all Roasters as such are identical and such practices do not include importing. Burden and discrimination among those engaged in identical economic established practices and having identical economic dependency as such, should occur,

if at all, only when plainly required, and by affirmative finding of necessity, and never by inference or innuendo.

11. It has been suggested that paragraph 14 (c) of the contract would be meaningless if the Roaster's practice as such were not burdened when integrated with the Importer practice. This is not necessarily correct. For the contract provides for certain forfeiture of subsidy by the Importer as such. It could mean that if the Importer's inventory included coffee on which his claim for subsidy had been denied or forfeited, and the Importer had thereby not received as much subsidy as he had coffee in inventory, he the Importer would not be required to pay or repay to R.F.C. a greater sum than he had been paid (reimbursed) by R.F.C. Certainly its meaning is not so clearly set out as an original burden upon the Roaster distribution practice as to be the equivalent of the "ownership and control" clause of other subsidies by regulation, or to include the Roaster practices in the purview of the contract. Should a contract under the same law be less clear than a regulation?

Conclusion

WHEREFORE, petitioner prays that this writ of certiorari be granted, and that this court's writ of certiorari issue to the United States Emergency Court of Appeals for the purpose of reviewing the questions hereinabove set out.

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